Supreme Court, U.S.
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NO. 85-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Ray E. Cagle,

Petitioner,

v.

Mary E. Cagle Carlson, Paul W. Mercer and Florence L. Mercer, and Gertrude Doyel,

Respondents.

Writ of Certiorari to the Arizona Court of Appeals, Division One

Petitioner's Reply Brief

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The Court below recognized, as the Respondent does not, that the due process issue must be faced; and that a decision on the tender issue did not obviate the need to reach the federal question. Respondent does not acknowledge that the state ground of

decision -- the tender issue -- applied to Petitioner's contentions below that the judicial sale was, in various respects, voidable. In *Young Mines Co. Ltd. v. Sevringhaus*, 38 Ariz. 160, 298 P. 628 (1931), relied upon by the Court below and by the Respondent here on the tender issue, the Arizona Supreme Court applied its tender rule to a case raising issues of voidability -- whether statutory procedures for conducting a sale were complied with.*

After discussing the tender issue, the Court below said (p. A-13, Petition for Certiorari), "Appellants next contend that they received no personal notice of the sheriff's foreclosure sale; that statutory

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* Indeed, two of the issues dealt with in *Young Mines* -- whether a sale price was adequate and whether sale in parcels should have been ordered -- were raised below in this case. (See Opening Brief, below, p. 6.) It was these parts of the case that the Court below resolved with the "tender" issue.

[procedures do] not provide due process notice." The opinion below then devotes eleven pages to a discussion of the due process issue.

Without saying so in so many words, the Court below recognized that if this sale was void, the tender rule would not completely dispose of this case. And, of course, where notice is lacking so that jurisdiction does not exist, a judgment or a proceeding *is* void. *E.g. Milliken v. Meyer*, 311 U.S. 457 (1940); *Cockerham v. Zikratch*, 127 Ariz. 230, 619 P.2d 739 (1980).

Thus, Respondent's implication that the decision below rests on an adequate and independent state ground is incorrect. This is a case in which the decision below "fairly appears to rest primarily on federal law," and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," *Michigan v. Long*,

463 U.S. 1032 (1983). Nor does the opinion "clearly and expressly" indicate that it is alternatively based on bona fide, separate, adequate, and independent grounds. *Caldwell v. Mississippi*, ___ U.S. ___, 105 S. Ct. 2633 (1985). Indeed, the Court below could not have so indicated. For if Petitioner is right on the due process issue, and proper notice was not given, then the sale by the sheriff was void, and nothing more would have to be proven. The Court below recognized that it could not stop at deciding the tender issue. It realized that it must reach the due process issue, and it did so. This Court, therefore, has jurisdiction and should exercise it in this case.

Respectfully submitted,

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April 11, 1986